

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

11	LONNY L. HODGES,)	
12	Plaintiff,)	2:04-cv-2535-GEB-KJM
13	v.)	<u>FINAL PRETRIAL ORDER</u>
14	COUNTY OF SHASTA; CITY OF)	
15	REDDING; OFFICER MATT)	
16	ZALESNY; OFFICER REBECCA)	
17	ZUFALL; OFFICER PAT LANHAM;)	
18	CORPORAL WALT BULLINGTON,)	
	Defendants. ¹)	
	_____)	

A final pretrial conference was held on December 18, 2006. Larry Baumbach appeared on behalf of Plaintiff; Gary Brickwood appeared on behalf of Defendants.

After hearing, the Court makes the following Order.

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¹ The caption is modified pursuant to Plaintiff's dismissals in the Joint Pretrial Statement and representations made at the final pretrial conference.

1 I. JURY/NON-JURY

2 All issues will be tried to a jury, except for the
3 ultimate question of whether an individual defendant is entitled to
4 qualified immunity from liability for Plaintiff's Fourth Amendment
5 claims. But the jury shall decide disputed factual issues
6 applicable to this defense.

7 II. DISPUTED EVIDENTIARY ISSUES

8 Any evidentiary dispute capable of being resolved in
9 limine shall be addressed using the following procedure. Counsel
10 for the parties are required to meet and confer about the dispute.
11 If the meeting fails to resolve the dispute, the parties are to set
12 forth their respective positions on the dispute in a document
13 entitled "Stipulation Re: Evidentiary Disagreements," that shall
14 be signed by counsel for the parties and filed no later than twenty
15 (20) court days before trial ("Stipulation").²

16 In the Stipulation, after the movant states the legal and
17 factual basis for opposing admission of a clearly-identified,
18 specific item of evidence, the nonmovant shall state its position.
19 *Failure to state a basis for admissibility or non-admissibility of*
20 *disputed evidence constitutes a waiver or abandonment of that*
21 *basis.* If the same argument or a portion thereof applies to a
22 dispute over other evidence, that argument may be incorporated by
23 reference where that other disputed evidence is argued.

24 This procedure is intended to expedite the trial by
25 allowing the judge to understand the factual context involving
26 disputed evidence and to make binding pretrial rulings. The

27
28 ² The parties also have leave to set forth their agreements
on any evidentiary matters in the Stipulation.

1 parties are cautioned that failure to utilize this procedure to
2 resolve an evidentiary issue which is capable of resolution in an
3 in limine motion may be deemed a waiver of objection to such
4 evidence, or could result in a ruling excluding the evidence.³

5 III. FACTUAL, LEGAL AND/OR EQUITABLE CONTENTIONS

6 A. The Final Pretrial Order supersedes the pleadings
7 and controls the facts and claims which may be presented at trial.
8 Any legal theory of relief or affirmative defense asserted in the
9 pleadings but not preserved for trial in this section of the Final
10 Pretrial Order cannot be raised during the trial. Therefore, to
11 preserve an issue for trial, and to be entitled to jury
12 instructions on that issue, the issue shall be identified and
13 preserved in this section of the Order. Failure to do so
14 dismisses, waives or abandons that issue, claim or defense.
15 Hotel Emp., et al. Health Tr. v. Elks Lodge 1450, 827 F.2d 1324,
16 1329 (9th Cir. 1987) ("Issues not preserved in the pretrial order
17 are eliminated from the action.").

18 B. The following issues are preserved for trial provided
19 jury instructions are submitted as required by Section IX of this
20 Order:

- 21 1. Plaintiff claims that the City and County
22 violated his Fourth Amendment right to be free
23 from excessive force by permitting officers to
24 abuse suspects of domestic violence.

25
26 ³ Since the judge disfavors side-bar conferences during
27 trial, counsel may be informed of this waiver in front of the jury.
28 Evidentiary disputes addressed in limine need not be included in
trial briefs as required by Local Rule 16-285(a) (3) (requiring that
"reasonably anticipated disputes concerning admissibility of
evidence" be included in trial briefs).

1 2. Plaintiff claims that his Fourth Amendment
2 right to be free from excessive force was
3 violated when Officer Lanham released an attack
4 police dog into the residence, and when
5 Officers Zalesny and Zufall and Corporal
6 Bullington struck him with batons and sprayed
7 him with pepper spray.

8 a. Each individual defendant asserts he
9 is shielded from liability by qualified
10 immunity for this claim.

11 3. Plaintiff claims that his State law right to be
12 free from assault was violated when Officer
13 Lanham released an attack police dog into the
14 residence, and when Officers Zalesny and Zufall
15 and Corporal Bullington struck him with batons
16 and sprayed him with pepper spray.

17 a. Each individual defendant asserts he
18 used reasonable force to effectuate
19 arrest.

20 4. Plaintiff claims that his State law right to be
21 free from battery was violated when Officer
22 Lanham released an attack police dog into the
23 residence, and when Officers Zalesny and Zufall
24 and Corporal Bullington struck him with batons
25 and sprayed him with pepper spray.

26 a. Each individual defendant asserts he
27 used reasonable force to effectuate
28 arrest.

1 5. Plaintiff claims that his State law right to be
2 free from intentional infliction of emotional
3 distress was violated when Officer Lanham
4 released an attack police dog into the
5 residence, and when Officers Zalesny and Zufall
6 and Corporal Bullington struck him with batons
7 and sprayed him with pepper spray.

8 a. Each individual defendant asserts he
9 used reasonable force to effectuate
10 arrest.

11 6. Plaintiff claims that his State law right to be
12 free from negligent infliction of emotional
13 distress was violated when Officer Lanham
14 released an attack police dog into the
15 residence, and when Officers Zalesny and Zufall
16 and Corporal Bullington struck him with batons
17 and sprayed him with pepper spray.

18 a. Each individual defendant asserts he
19 used reasonable force to effectuate
20 arrest.

21 7. Plaintiff claims that his State law right to be
22 free from false imprisonment was violated when
23 Officer Lanham released an attack police dog
24 into the residence, and when Officers Zalesny
25 and Zufall and Corporal Bullington struck him
26 with batons and sprayed him with pepper spray.

1 a. Each individual defendant asserts
2 he used reasonable force to
3 effectuate arrest.

4 8. Plaintiff claims \$3 million in punitive damages
5 against the individual defendants for his
6 Fourth Amendment claim and the intentional tort
7 claims.

8 9. Each side seeks attorney fees under 28 U.S.C. §
9 1988.

10 C. In addition to the matters set forth in Local Rule
11 16-285, the parties shall brief the following points of law in
12 their trial briefs.

13 1. The elements, standards, and burdens of proof as
14 to each of Plaintiff's causes of action, including citations of
15 authority in support thereof.

16 2. The elements, standards, and burdens of proof
17 as to each of Defendant's defenses, including citations of
18 authority in support thereof.

19 Notwithstanding Local Rule 16-285, trial briefs shall be
20 filed with the Court no later than twenty (20) court days prior to
21 the date of trial. A joint or partial joint trial brief is
22 permitted. All legal positions briefed in the trial brief shall be
23 supported with case and applicable statutory authority. See Local
24 Rule 16-285. If separate or partial separate trial briefs are
25 submitted, responding briefs, if any, shall be filed with the Court
26 no later than five (5) court days prior to trial. **The trial**
27 **brief(s) must include "a summary of points of law, including**
28 **reasonably anticipated disputes concerning admissibility of**

1 **evidence, legal arguments, and citations of authority in support**
2 **thereof.” Local Rule 16-285(a) (3) .**

3 IV. WITNESSES

4 A. Plaintiff anticipates calling the witnesses listed on
5 Exhibit A.

6 B. Defendants anticipate calling the witnesses listed on
7 Exhibit B.

8 C. Each party may call a witness designated by the
9 other.

10 D. No person, other than those named on these witness
11 lists, will be permitted to testify unless:

12 (1) The party offering the witness demonstrates that
13 the witness is for the purpose of rebutting evidence which could
14 not reasonably be anticipated at the pretrial conference; or

15 (2) The witness was discovered after the pretrial
16 conference and the proffering party makes the showing required in
17 "E", below.

18 E. If a witness is discovered after the pretrial
19 conference, counsel for the party offering the witness shall
20 promptly inform the Court and opposing parties of the existence of
21 the unlisted witness so that the Court may consider at trial
22 whether the witness shall be permitted to testify. The witness
23 will be not be permitted to testify unless:

24 (1) The witness could not reasonably have been
25 discovered prior to pretrial;

26 (2) The Court and opposing counsel were promptly
27 notified upon discovery of the witness;
28

1 (3) If time permitted, counsel offered the witness
2 for deposition; and

3 (4) If time did not permit, a reasonable summary of
4 the witness' testimony was provided to opposing counsel.

5 V. EXHIBITS

6 A. Plaintiff anticipates offering the exhibits listed on
7 Exhibit C.

8 B. Defendants anticipate offering the exhibits listed on
9 Exhibit D.

10 C. No other exhibits will be permitted to be introduced
11 unless:

12 (1) The party seeking to use the unlisted exhibit
13 demonstrates that the exhibit is being used to rebut evidence which
14 could not reasonably have been anticipated at the pretrial
15 conference; or

16 (2) The unlisted exhibit was discovered after the
17 pretrial conference and the offering party makes the showing
18 required in paragraph "D", below.

19 D. Any party proposing to introduce an exhibit which was
20 discovered after the pretrial conference shall promptly notify the
21 Court and opposing counsel of the existence of such exhibit. The
22 Court will not permit any such exhibit to be introduced unless it
23 finds:

24 (1) That the exhibit could not reasonably have been
25 discovered prior to the pretrial conference;

26 (2) The Court and counsel were promptly informed of
27 the exhibit's existence; and
28

1 (3) That the offering party has delivered a copy of
2 the exhibit to opposing counsel, or, if the exhibit may not be
3 copied, that the offering counsel has made the exhibit reasonably
4 available for inspection by opposing counsel.

5 E. Plaintiff's exhibits shall be numbered and marked
6 with colored stickers provided by the Court while Defendants'
7 exhibits shall be designated by alphabetical letter also marked
8 with colored stickers provided by the Court. To obtain stickers,
9 parties should contact the Clerk of Court at (916) 930-4000.

10 The parties are directed to exchange with each other, at
11 least twenty (20) court days prior to trial, copies of all of their
12 respective exhibits, marked with exhibit stickers provided by the
13 Court. Within five (5) court days after receipt and examination of
14 the exhibits, each party shall file with the Court and serve upon
15 opposing counsel objections, if any, to the exhibits, referencing
16 the exhibits as marked by exhibit sticker and specifying the basis
17 for each objection.⁴ Failure to exchange exhibits as ordered could
18 result in the exhibit not being used at trial and/or the imposition
19 of sanctions. The failure to make objections in the manner
20 prescribed by this section shall constitute a waiver of objections.
21 A party seeking to admit into evidence an exhibit to which no
22 objection was made must identify said exhibit for the record and
23 then move it into evidence.

24 Counsel shall produce all exhibits to the Clerk's Office
25 on the Friday before the before trial date, no later than 4:00 p.m.
26 At that time, the parties shall also furnish the Court with a copy
27

28 ⁴ The parties have leave to file joint exhibits. The above
procedure is designed for separate exhibits.

1 of each exhibit, unless the exhibit is physically incapable of
2 being reproduced. Failure to produce exhibits as ordered could
3 result in waiver of the right to offer those exhibits. Each party
4 submitting exhibits shall furnish a list to the Court, the
5 courtroom deputy and opposing counsel itemizing the exhibits.

6 VI. FURTHER PREPARATION FOR USE OF DISCOVERY DOCUMENTS⁵

7 A. It is the duty of counsel to ensure that any
8 depositions which are to be used at trial for any purpose shall
9 have been filed with the clerk, and counsel are cautioned that a
10 failure to discharge this duty may result in preclusion of the use
11 of the unfiled depositions or in the imposition of such other
12 sanctions as the Court deems appropriate.

13 B. No later than twenty (20) court days before the trial
14 commencement date, counsel for each party shall serve on the other
15 parties a statement designating all answers to interrogatories and
16 all portions of depositions (except for passages to be used solely
17 for refreshing recollection, impeachment or rebuttal). No later
18 than ten (10) court days before the trial commencement date,
19 counter-designations of other portions of these discovery documents
20 may be served. No later than five (5) court days before trial, the
21 parties shall file and serve any preserved evidentiary objections
22 to any designated discovery, or said objections are waived.

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25 ⁵ Counsel for the parties are required to meet and confer
26 on whether it is appropriate to submit any documents to the judge
27 prior to trial. If the parties decide this is appropriate, they
28 shall reflect their agreement in a stipulation which has attached
thereto whatever documents they agree can be considered by the
judge before trial. The stipulation should be filed and submitted
to the judge's chambers at the parties' earliest convenience.

1 VII. FURTHER DISCOVERY OR MOTIONS

2 Pursuant to the Court's Pretrial Scheduling Order, all
3 discovery and law and motion was to have been completed prior to
4 the date of the final pretrial conference. That order is
5 confirmed. The parties are, of course, free to conduct any
6 additional discovery they desire pursuant to informal agreement.
7 However, any such agreement will not be enforceable in this Court.

8 VIII. SEPARATE TRIAL OF ISSUES

9 The trial will be conducted in two phases: liability and
10 punitive damages. If the jury finds punitive damages are
11 recoverable in the liability phase, trial on the amount of punitive
12 damages will immediately occur. During the first phase of the
13 trial, the jury will be given a liability instruction on punitive
14 damages along with the other closing instructions and a verdict
15 form which will include the liability question on punitive damages.
16 If the answer is yes, then evidence pertinent to the amount of
17 punitive damages would be presented in the second phase of the
18 trial, following which the parties would present closing argument
19 on that issue and a jury instruction would be given. The jury
20 would then deliberate on the issue and fill in a punitive damages
21 verdict form.

22 IX. JURY INSTRUCTIONS, VOIR DIRE, AND VERDICT FORMS

23 A. The parties are to prepare jury instructions, in the
24 manner specified in paragraph B below. Counsel shall tailor all
25 general instructions to the facts and issues in suit.

26 B. Counsel are directed to confer and to attempt to
27 agree upon a joint set of jury instructions and verdict forms.

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1 C. All instructions, both general and specific, shall
2 be submitted in the exact numerical order counsel desires them
3 given to the jury and shall be tailored to the facts and issues in
4 suit.

5 The joint set of instructions and verdict forms shall be
6 filed with the court clerk fifteen (15) court days prior to the
7 date of the trial. As to instructions on which there is dispute,
8 the parties shall adhere to the following procedure: 1) the party
9 offering the disputed instruction(s) shall submit the
10 instruction(s) as its proposed jury instructions, shall submit
11 authority in support of the proposed instruction(s) and shall
12 number the disputed instruction(s) in a manner that shows where
13 each disputed instruction should be placed in the tendered agreed
14 upon instructions. The contested instruction(s) and supporting
15 authority shall be filed with the joint set of instructions fifteen
16 (15) court days prior to the date of the trial; 2) the party
17 opposed to the contested instruction(s) shall file opposing
18 authority ten (10) court days prior to the date of the trial.

19 D. All instructions shall be, to the extent possible,
20 concise, understandable, and neutral statements of law. They shall
21 be prepared in accordance with Local Rule 51-163. Ninth Circuit
22 Pattern Instructions are preferred.

23 E. It is the parties' responsibility to ensure that
24 jury instructions are submitted on all issues preserved for trial
25 in accordance with the schedule set forth above. Pursuant to Local
26 Rule 51-163, instructions not presented in accordance with this
27 Order will be refused unless it is shown either (1) that the
28 necessity for the request arose in the course of trial; the

1 instructions could not reasonably have been anticipated prior to
2 trial from the Final Pretrial Order; and the request for such
3 additional instructions is presented to the Court as promptly as
4 possible; or (2) that the refusal to give such instructions would
5 constitute manifest injustice under Rule 16(e).

6 F. Most of the examination of prospective jurors is
7 conducted by the Court. The parties are directed to meet and
8 confer and attempt to agree upon a joint set of proposed voir dire
9 questions. These questions shall include any voir dire questions
10 supplied by the Court that the parties believe are necessary. The
11 joint set of voir dire questions shall be filed with the Court
12 fifteen (15) court days prior to the date of the trial. Parties
13 may also submit proposed voir dire questions which are disputed.
14 Disputed voir dire questions shall be filed with the Court fifteen
15 (15) court days prior to the date of the trial and shall be
16 accompanied by an explanation as to the need for the question and
17 supporting case authority when available. The opposing party shall
18 respond with reasons for the opposition and any supporting case
19 authority no later than ten (10) court days prior to the date of
20 trial. Each side is granted fifteen (15) minutes to conduct voir
21 dire following the Court's examination of prospective jurors.

22 G. The parties shall file a joint verdict form
23 concurrently with proposed jury instructions fifteen (15) court
24 days prior to the commencement of trial. See L.R. 51-163(e). A
25 special verdict or interrogatories shall be included for all
26 factual disputes submitted to the jury that must be resolved before
27 questions of law can be decided, and for any other issue on which
28 specific responses are desired. The verdict form shall be prepared

1 in accordance with Local Rule 51-163(e). At the same time, where
2 disagreements exist, the parties shall explain the disagreement and
3 submit points and authorities supporting their respective
4 positions.

5 At the time of electronically filing the jury
6 instructions and verdict forms, counsel shall also submit a copy of
7 the sanitized joint jury instructions, the sanitized disputed jury
8 instructions, and the joint verdict forms to the Court by email to
9 geborders@caed.uscourts.gov in accordance with L.R. 51-163(b)(1).

10 X. PROPOSED FINDINGS AND CONCLUSIONS

11 The parties have identified qualified immunity as the only
12 issue to be decided by the Court. The parties are directed to
13 submit proposed prevailing party findings and conclusions on this
14 issues ten (10) court days before trial. The parties may
15 supplement their proposed findings and conclusions as trial
16 progresses, up until closing arguments.

17 XI. USE OF STRUCK JURY SELECTION SYSTEM

18 Nine (9) jurors will be impaneled. The "struck jury"
19 system will be used to select the jury.⁶ At the beginning of the
20 voir dire process, approximately eighteen prospective jurors,
21 randomly selected by the Jury Administrator, will be seated for
22 voir dire. The order of the jurors' random selection is reflected

23
24 ⁶ As explained in United States v. Blouin, 666 F.2d 796,
25 798 (2d Cir. 1981), "the goal of the 'struck jury' system is to
26 whittle down an initially selected group . . . [to the amount of
27 jurors] who will serve as the petit jury." The selected group
28 consists of the jurors who will hear the case, plus the number of
jurors required to enable the parties to use the combined number of
peremptory challenges allotted to both sides for striking jurors
from the group. Typically extra jurors are included in the select
group in the event the minimum amount of jurors required for the
"struck system" is reduced "for cause" or some other reason.

1 by the order in which they will be seated. The first randomly
2 selected juror will be in jury seat number one, which is at the
3 extreme right-hand side of the jury box in the top row as the jury
4 box is viewed from the well of the courtroom. The eighth juror
5 will be in the eighth seat. The ninth selected juror will occupy
6 the seat located at the extreme right-hand side of the jury box in
7 the bottom row. The fifteenth seat will be in the left-hand side
8 of that row. Three chairs will be placed in front of the jury box.
9 The sixteenth juror will occupy the seat on the right and the
10 eighteenth juror will occupy the seat on the left. The first nine
11 jurors on a list, which shall be given to counsel, will constitute
12 the petit jury unless one or more of those nine is excused for some
13 reason. Assuming that the first and fifth jurors on the list are
14 excused, the second listed juror becomes the first, and the other
15 jurors' numbers are changed accordingly, with the ninth juror on
16 the list becoming seventh on the list; however, the jurors continue
17 to be identified by their original numbers.

18 Following the voir dire questioning, each side will take
19 turns exercising its three allotted peremptory strikes.⁷ If a side
20 elects to pass rather than exercise a particular peremptory
21 challenge, that challenge is waived.

22 XII. ATTORNEYS FEES

23 The parties are referred to Local Rule 54-293 concerning
24 the post-trial procedure for seeking an award of attorney's fees.

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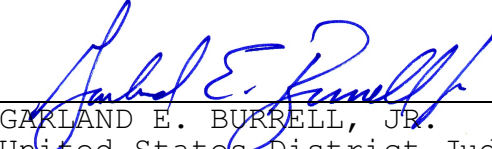
26
27 ⁷ During the questioning, the attached Query Re Excuse
28 Potential Jurors form could be given to the parties to determine if
a particular juror should be excused.

XIII. TRIAL DATE

Trial to a jury will commence on March 20, 2007.⁸ A trial day will commence at 9:00 a.m. and will adjourn at approximately 4:30 p.m. At the first phase of the trial, each side has thirty (30) minutes within which to make an opening statement to the jury and one-hundred and ten (110) minutes within which to make a closing argument. If trial proceeds to the second phase, each side has twenty (20) minutes within which to make a closing argument on the punitive damage issue. Counsel are to call Shani Furstenau, Courtroom Deputy, at (916) 930-4114, one week prior to trial to ascertain the status of the trial date.

IT IS SO ORDERED.

Dated: December 19, 2006


GARLAND E. BURRELL, JR.
United States District Judge

⁸ The parties estimate it will take eight (8) days to try the case.